

1 THE HONORABLE THOMAS S. ZILLY  
2  
3  
4  
5  
6

7 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
8

9 BUNGIE, INC.,  
10 Plaintiff,  
11 v.  
12 AIMJUNKIES.COM; PHOENIX  
13 DIGITAL GROUP LLC; DAVID  
SCHAEFER; JORDAN GREEN;  
JEFFREY CONWAY; and JAMES MAY,  
14 Defendants.

No. 2:21-cv-811-TSZ

**DECLARATION OF JACOB P. DINI IN  
SUPPORT OF BUNGIE, INC.'S MOTION  
FOR PROTECTIVE ORDER**

I, Jacob P. Dini, declare as follows:

1. I am an attorney licensed to practice law before the courts of the State of  
Washington. I am an attorney at Perkins Coie LLP, and counsel in this action for Plaintiff Bungie,  
Inc. ("Bungie" or "Plaintiff"). I submit this declaration in support of Bungie, Inc.'s Motion for  
Protective Order. I have personal knowledge of the facts stated herein and, if called upon, could  
and would testify competently thereto under oath.

2. Attached hereto as **Exhibit A** is a true and correct copy of an email sent by Christian  
Marcelo to Phil Mann on April 6, 2023.

3. Attached hereto as **Exhibit B** is a true and correct copy of an email sent by Christian  
Marcelo to Phil Mann on April 18, 2023.

DINI DECL. ISO BUNGIE'S MOT. FOR  
PROTECTIVE ORDER  
(No. 2:21-cv-811-TSZ) – 1

161878328.1

**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

4. Attached hereto as **Exhibit C** is a true and correct copy of the complaint (Dkt. No. 1) filed in *Bungie, Inc. v. [REDACTED]*, Case No. 2:22-cv-00981-RAJ (W.D. Wash.).

5. Attached hereto as **Exhibit D** are true and correct copies of excerpts from the October 31, 2022 30(b)(6) deposition of David Schaefer as the corporate representative of Phoenix Digital Group LLC.

6. Attached hereto as **Exhibit E** are true and correct copies of excerpts from the March 20, 2023 30(b)(6) deposition of David Schaefer as the corporate representative of Phoenix Digital Group LLC.

7. Attached hereto as **Exhibit F** are true and correct copies of excerpts from the October 28, 2022 personal deposition of David Schaefer.

8. Attached hereto as **Exhibit G** is a true and correct copy of a decision in the Canadian case captioned *Bungie, Inc., et al. v. TextNow Inc.*, No. CV-22-682808, 2022 ONSC 4181 (CanLII July 15, 2022).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 20th day of April, 2023.

/s/Jacob P. Dini  
Jacob P. Dini

DINI DECL. ISO BUNGIE'S MOT. FOR  
PROTECTIVE ORDER  
(No. 2:21-cv-811-TSZ) - 2

# EXHIBIT A

**Dini, Jacob (SEA)**

---

**From:** Marcelo, Christian W. (SEA)  
**Sent:** Thursday, April 6, 2023 9:39 PM  
**To:** Phil Mann  
**Cc:** Rava, William C. (SEA); Dini, Jacob (SEA)  
**Subject:** RE: Bungie v. Aimjunkies et al.

Received. We'll check regarding availability. As a reminder Bungie has designated the identity of this deponent as Attorneys Eyes Only. Please treat this notice as AEO under the protective order.

Christian Marcelo | Perkins Coie LLP  
D. +1.206.359.3315

-----Original Message-----

From: Phil Mann <phil@mannlawgroup.com>  
Sent: Thursday, April 6, 2023 5:02 PM  
To: Rava, William C. (SEA) <WRava@perkinscoie.com>; Marcelo, Christian W. (SEA) <CMarcelo@perkinscoie.com>; Dini, Jacob (SEA) <JDini@perkinscoie.com>  
Subject: Re: Bungie v. Aimjunkies et al.

Dear Counsel,

Attached for service on you is Defendants Notice of Deposition for the witness identified therein.

Best Regards,

Phil

# **EXHIBIT B**

**Dini, Jacob (SEA)**

---

**From:** Marcelo, Christian W. (SEA)  
**Sent:** Tuesday, April 18, 2023 1:02 PM  
**To:** Phil Mann  
**Cc:** Rava, William C. (SEA); Dini, Jacob (SEA)  
**Subject:** RE: Bungie v. Aimjunkies et al.

Let's plan on 5/3 then.

Thanks,

Christian

Christian Marcelo | Perkins Coie LLP  
D. +1.206.359.3315

-----Original Message-----

From: Phil Mann <phil@mannlawgroup.com>  
Sent: Tuesday, April 18, 2023 10:31 AM  
To: Marcelo, Christian W. (SEA) <CMarcelo@perkinscoie.com>  
Cc: Rava, William C. (SEA) <WRava@perkinscoie.com>; Dini, Jacob (SEA) <JDini@perkinscoie.com>  
Subject: Re: Bungie v. Aimjunkies et al.

Thanks Christian, we can make either day work.

Phil

On 4/18/23 8:38 AM, Marcelo, Christian W. (SEA) wrote:

> Thanks, was just writing a follow up from our call Wednesday. I understand Defendants' position on the witness is that they do not object to a Confidential designation, but do object to a Highly Confidential (AEO) designation under the parties' stipulated protective order.

>

> As I indicated on the call, we will plan to file a motion for a protective order on this issue, aiming to file this week. For the witness's deposition availability we can do May 2 or May 3, which will hopefully allow enough time for Judge Zilly to rule on the motion. Let us know if either works on your end.

>

> Best,

>

> Christian

>

> Christian Marcelo | Perkins Coie LLP

> D. +1.206.359.3315

>

> -----Original Message-----

> From: Phil Mann <phil@mannlawgroup.com>

> Sent: Tuesday, April 18, 2023 8:35 AM

> To: Marcelo, Christian W. (SEA) <CMarcelo@perkinscoie.com>

> Cc: Rava, William C. (SEA) <WRava@perkinscoie.com>; Dini, Jacob (SEA)

> <JDini@perkinscoie.com>  
> Subject: Re: Bungie v. Aimjunkies et al.  
>  
> Christian, I am following up on this. Is the witness available on the 20th? Also, as you have not to our our knowledge  
filed a motion with the court, it is our intention to have Mr. Schaefer witness the entire deposition, albeit on a  
"confidential" basis.  
>  
> Regards,  
>  
> Phil  
>  
>  
> On 4/6/23 9:39 PM, Marcelo, Christian W. (SEA) wrote:  
>> Received. We'll check regarding availability. As a reminder Bungie has designated the identity of this deponent as  
Attorneys Eyes Only. Please treat this notice as AEO under the protective order.  
>>  
>> Christian Marcelo | Perkins Coie LLP  
>> D. +1.206.359.3315  
>>  
>> -----Original Message-----  
>> From: Phil Mann <phil@mannlawgroup.com>  
>> Sent: Thursday, April 6, 2023 5:02 PM  
>> To: Rava, William C. (SEA) <WRava@perkinscoie.com>; Marcelo,  
>> Christian W. (SEA) <CMarcelo@perkinscoie.com>; Dini, Jacob (SEA)  
>> <JDini@perkinscoie.com>  
>> Subject: Re: Bungie v. Aimjunkies et al.  
>>  
>> Dear Counsel,  
>>  
>> Attached for service on you is Defendants Notice of Deposition for the witness identified therein.  
>>  
>> Best Regards,  
>>  
>> Phil  
>>  
>>  
>> \_\_\_\_\_  
>>  
>> NOTICE: This communication may contain privileged or other confidential information. If you have received it in error,  
please advise the sender by reply email and immediately delete the message and any attachments without copying or  
disclosing the contents. Thank you.  
> \_\_\_\_\_  
>  
> NOTICE: This communication may contain privileged or other confidential information. If you have received it in error,  
please advise the sender by reply email and immediately delete the message and any attachments without copying or  
disclosing the contents. Thank you.

# EXHIBIT C

# FILED UNDER SEAL

# EXHIBIT D

1 ARBITRATION BEFORE JAMS

2 \_\_\_\_\_

3 BUNGIE, INC., )  
4 Plaintiff, ) CERTIFIED COPY  
5 )  
6 v. ) No. 5160000075  
7 )  
8 AIMJUNKIES.COM; PHOENIX )  
9 DIGITAL GROUP LLC; DAVID )  
SCHAEFER; JORDAN GREEN; )  
JEFFERY CONWAY; and JAMES MAY, )  
9 Respondents. )

10

11 \_\_\_\_\_

12 REMOTE VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION  
13 OF  
14 DAVID SCHAEFER 30 (B) (6)

15 \_\_\_\_\_

16 9:02 A.M.

17 October 31, 2022

18 (All participants appeared via videoconference.)

19

20

21

22

23

24 LAURA GJUKA, CSR #10555

25 JOB NO.: 928469

1 REMOTE APPEARANCES

2 FOR THE CLAIMANT (via videoconference):

3 CHRISTIAN MARCELO  
4 JACOB P. DINI  
5 PERKINS COIE, LLP  
6 1201 Third Avenue, Suite 4900  
7 Seattle, WA 98101-3099  
8 CMarcelo@perkinscoie.com  
9 JDini@perkinscoie.com

10 JAMES BARKER  
11 BUNGIE, INC.  
12 550 106th Avenue NE  
13 Bellevue, WA 98004  
14 jbarker@bungie.com

15 FOR THE RESPONDENTS (via videoconference):

16 PHILIP P. MANN  
17 MANN LAW GROUP, PLLC  
18 403 Madison Avenue North, Suite 240  
19 Bainbridge Island, WA 98110  
20 phil@mannlawgroup.com

21 VIDEOGRAPHER:

22 ALBERT SALAZ

23 ALSO PRESENT:

24 JEFFERY CONWAY  
25 JAMES MAY  
26 JORDAN GREEN  
27 WILLIAM RAVA

1	I N D E X	Page 3
2	EXAMINATION BY:	PAGE
3	MR. MARCELO	5
4	MR. MANN	118
5		
6		
7	EXHIBIT INDEX	
8	EXHIBIT MARKED	PAGE
9	45 Amended Notice of Deposition	7
10	46 PayPal Statement, 0031	22
11	47 Excel Worksheet	24
12	48 PayPal Statement, 3354	43
13	49 Ukrainian BME To Acquire Leading Independent US Videogame Cheat Distributor, Aimjunkies	45
14		
15	50 Website Asset Purchase Agreement	52
16	51 PayPal Statement, 7696	57
17	52 Excel Worksheet	60
18	53 PayPal Statement, 3104	65
19	54 Excel Worksheet	68
20	55 PayPal Statement, 1346	70
21	56 Excel Worksheet	72
22	57 Declaration	90
23	58 Form 1065, 2019, Phoenix Digital Group	96
24		
25	59 Form 1065, 2020, Phoenix Digital Group	99

Page 4

1 VIDEOGRAPHER: Good morning. Here  
2 begins the remote deposition of David Schaefer in the  
3 matter of Bungie, Incorporated, versus AimJunkies.com et  
4 al. This case is in arbitration before JAMS.  
5 Today's -- today's date is October 31st, 2022, and we're  
6 on the record at 9:02 a.m. This is a remote deposition  
7 through Zoom video conferencing. The videographer is  
8 Albert Salaz appearing on behalf of Centext Litigation  
9 Services.

10                   Would counsel for all parties please identify  
11                   themselves and state whom they represent.

12 MR. MARCELO: Christian Marcelo from  
13 Perkins Coie representing Claimant Bungie, Inc., and I'm  
14 joined by William Rava and Jacob Dini from Perkins Coie,  
15 as well as James Barker from Bungie.

16 MR. MANN: And I'm Phillip Mann  
17 representing the respondents in this case as well as the  
18 individual witness, David Schaefer.

22

23

24

25

1 DAVID SCHAEFER, witness herein, having been  
2 duly sworn by the Certified  
3 Court Reporter, testified  
4 under oath as follows:

5

6 VIDEOGRAPHER: Please begin.

7

8 EXAMINATION

9 BY MR. MARCELO:

10 Q. Mr. Schaefer, good to see you again.

11 A. Good to see you.

12 Q. So I know we just went through a deposition  
13 on Friday, so you probably know the rules, so I'll --  
14 I'll go over some quickly again, you know, same rules as  
15 Friday. Let's speak one at a time. When I -- let me  
16 finish my question before you answer the question. And  
17 if something's unclear, please ask me to clarify the  
18 question, okay?

19 A. Sure.

20 Q. And you understand --

21 A. My apologies for answering before you finish  
22 asking.

23 Q. You understand you're under oath today?

24 A. Yes.

25 Q. The same oath you would take in a courtroom?

1 A. I wouldn't go that far.

2 Q. It received income from selling Destiny 2  
3 cheats, right?

4 A. That is correct.

5 Q. And it distributed that income to various  
6 parties, right?

7 A. I would have to, you know, sit -- I don't  
8 remember.

9 Q. You don't remember if various parties  
10 received payments based on the number of cheats sold at  
11 Phoenix -- through Phoenix Digital?

12 A. I don't remember.

13 (Simultaneous speaking.)

14 A. I testified on Friday that they were paid  
15 through Bitcoin.

16 Q. And so they were paid? Developers were paid  
17 for cheats sold through Phoenix Digital, right?

18 MR. MANN: Object to the form.

19 A. What's the question again?

20 Q. Phoenix Digital paid developers of cheats,  
21 right?

22 A. Yes.

23 Q. Based on the number of cheats that the  
24 developer sold, right?

25 A. Yes.

1           **Q.**     Let's go through some of the payments from  
2     this PayPal account. I'm going to filter the account  
3     party name to Lisa's Repair.

4           A.     Really? You want to go there again?

5           **Q.**     **You see --**

6           A.     Is this -- Christian, is this a big player in  
7     this lawsuit, or is this just trying to harass me?

8           **Q.**     **You see these --**

9           A.     Because when you're fucking around with an  
10    ex-girlfriend, you're going to get me up on the tire  
11    because she has nothing to fucking do with this shit,  
12    and if you guys -- just wait until we open up your  
13    people because then when I go to the guy that bought the  
14    cheat and I have my lawyer ask him who his girlfriend  
15    might have been or when was or where they rented from at  
16    the time or what they did together, let's see what his  
17    fucking answers are. Christian, back off. Stay in your  
18    lane.

19           **Q.**     **Mr. Schaefer, are you saying Lisa Holly is an**  
20    **ex-girlfriend?**

21           A.     I'm not saying that. I used that as an  
22    example, young man.

23           **Q.**     **Is Lisa Holly an ex-girlfriend?**

24           A.     It's not relevant, and I won't fucking answer  
25    the question. And if you want to go digging, you go

1 ahead and dig. We'll fight on that one too. Because  
2 you guys can play around in the Sandbox all you want,  
3 but when you start getting into personal shit, I don't  
4 give a shit if it's Jeff Conway, I don't give a shit if  
5 it's Jordan Green, or if it's me, you're going to find  
6 out what I'm about. Because when I open your people up  
7 over there at Bungie, let's see what they got hiding in  
8 their closets. Am I saying I got something hiding in my  
9 closet? No. But you know what? I know those engineers  
10 over there when we open them up, they're not exactly  
11 going to say nice things either.

12           **Q. Mr. Schaefer, on Friday you testified that**  
13           **payments to Lisa Holly were strictly for rent payments;**  
14           **do you recall that?**

15           A. That is correct. What do you want to do?  
16 You want to talk about the car rental, or what do you  
17 want to talk about?

18           **Q. Did Lisa Holly do any work for**  
19           **Phoenix Digital?**

20           A. No.

21           **Q. Let's go to Row 291.**

22           A. Do you understand, how many entries in here  
23 has Conway put in here for a tax deduction? Have you  
24 ever thought about that, or do you just think you've got  
25 to go down this path?

1           Q.     **Do you see Row 291?**

2           A.     Sure. Why not?

3           Q.     **And the notes column says, "Website Support."**

4     **Do you see that?**

5           A.     Yep.

6           Q.     **Did Lisa Holly provide website support for**  
7 **Phoenix Digital?**

8           A.     Not a fucking day in her life.

9           Q.     **When you say Mr. Conway put in entries for**  
10 **tax deduction, are you saying that he put entries**  
11 **related to Phoenix Digital in order to get a tax**  
12 **deduction?**

13          A.     No, are all -- every one of these entries in  
14 here itemized so that when it comes to tax time he has  
15 some sort of reference what was going on. Have I not  
16 told -- have we not proven time and time again that  
17 these entries were probably entered incorrectly? I  
18 don't think Mr. Conway did it intentionally. I have no  
19 doubt that he didn't do it intentionally.

20          Q.     **Do you know what website support is referring**  
21 **to in Column 291?**

22          A.     Oh, God. No idea. Do you?

23          Q.     **There's also a number of references to Amex,**  
24 **Rows 104, 105, 356, 357. Do you know what those are**  
25 **referring to?**

1           A.       Yeah, Mr. Conway's perm- -- personal American  
2       Express account. Do you want to go in there?

3           Q.       **So the payments to Lisa's Repair were in**  
4       **regards to Mr. Conway's personal Amex account?**

5           A.       I don't know what he paid her for.

6           Q.       **Didn't you just testify that you directed**  
7       **Mr. Conway what payments to make?**

8           A.       Sure. Absolutely.

9           Q.       **Are these payments that you directed**  
10      **Mr. Conway to make?**

11                  MR. MANN: Object to the form.

12           A.       What are they for?

13           Q.       **Well, let's look at Row 356. It says, "Mini**  
14      **Gourmet Amex." Do you know what that refers to?**

15           A.       No, I do not.

16           Q.       **Did you direct Mr. Conway to make that**  
17      **payment?**

18           A.       Yes.

19           Q.       **Do you know what the Holiday Inn Amex is?**

20           A.       No, I do not.

21           Q.       **Do you know what the Parker's Lighthouse Amex**  
22      **is?**

23           A.       No, I do not.

24           Q.       **Do you know -- do you know what the Hertz**  
25      **Amex is?**

1 STATE OF CALIFORNIA ) ss

2

3 I, LAURA A. GJUKA, CSR 10555, do hereby declare:

4

5 That, prior to being examined, the witness named  
6 in the foregoing deposition was by me duly sworn  
7 pursuant to Section 2093(b) and 2094 of the Code of  
8 Civil Procedure;

9

10 That said deposition was taken down by me in  
11 shorthand at the time and place therein named and  
12 thereafter reduced to text under my direction.

13

14 I further declare that I have no interest in the  
15 event of the action.

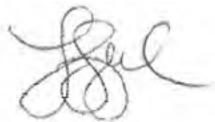
16

17 I declare under penalty of perjury under the laws  
18 of the State of California that the foregoing is true  
19 and correct.

20

21 WITNESS my hand this 7th day of November, 2022.

22



23 LAURA A. GJUKA, CSR 10555

24

25

# **EXHIBIT E**

3  
4 BUNGIE, INC., )  
5 Plaintiff, ) **CERTIFIED COPY**  
6 vs. ) No. 2:21-cv-811-TSZ  
7 AIMJUNKIES.COM; PHOENIX )  
8 DIGITAL GROUP, LLC; DAVID )  
9 SCHAEFER; JORDAN GREEN; )  
0 JEFFREY CONWAY; and JAMES )  
1 MAY, )  
2 Defendants. )

14 VIDEO RECORDED 30 (B) (6) DEPOSITION UPON ORAL EXAMINATION  
15 OF PHOENIX DIGITAL GROUP, LLC  
16 BY DAVID SCHAEFER

18 6:02 P.M.

19 MARCH 20, 2023

20 WITNESS LOCATED AT: UNDISCLOSED LOCATION

21

22

23

24

24 REPORTED BY: BETSY E. DECATER, RPR, CCR 3109

25      JOB NO.: 971984

1 A P P E A R A N C E S

2

3 FOR THE PLAINTIFF:

4 CHRISTIAN W. MARCELO  
5 Perkins Coie LLP  
6 1201 Third Avenue  
7 Suite 4900  
8 Seattle, Washington 98101-3099  
9 (206) 359-8000  
10 cmarcelo@perkinscoie.com

11

12 FOR THE DEFENDANTS:

13 PHILIP P. MANN  
14 Mann Law Group  
15 403 Madison Avenue North  
16 Suite 240  
17 Bainbridge Island, Washington 98110  
18 (206) 855-8839  
19 phil@mannlawgroup.com

20

21 ALSO PRESENT: SCOTT NORTON, Videographer  
22 JAMES BARKER

23

24

25

1	I N D E X	Page 3
2		
3	EXAMINATION BY:	PAGE(S)
4	MR. MARCELO	5
5		
6		
7	EXHIBITS FOR IDENTIFICATION	PAGE
8		
9	Exhibit 60 Counterclaim Exhibit E	13
10	Exhibit 61 Screen Shot AimJunkies Website 3/19/23	36
11	Exhibit 62 Notice of Deposition	74
12	Exhibit 63 Notice of Deposition	75
13	Exhibit 64 Phoenix Digital's Supplemental Responses to Interrogatory 10	78
14		
15	Exhibit 65 Exhibit 5 to Bungie's Amended Complaint	101
16		
17	Exhibit 66 Screen Shot of AimJunkies Website with Post Dated 3/19/23	118
18		
19		
20		
21		
22		
23		
24		
25		

1 MARCH 20, 2023

2 6:02 P.M.

3 --oo--

4

5 VIDEOGRAPHER: Good evening, everyone. Here  
6 begins the remote deposition of Phoenix Group, LLC,  
7 pursuant FRCP 30(b)(6). This is in the matter of  
8 Bungie, Inc. versus AimJunkies.com, et al. This case is  
9 in the United States District Court, Western District of  
10 Washington at Seattle. Case number is 2:21-cv-811-TSZ.

11 Today's date is Monday, March 20th, 2023. The  
12 current time is 6:02 p.m. Pacific time. This is a  
13 remote deposition through Zoom video conferencing. The  
14 videographer is Scott Norton, here on behalf Centex  
15 Litigation Services. Would counsel please introduce  
16 yourselves and state whom you represent?

17 MR. MARCELO: Christian Marcelo for  
18 Plaintiff, Bungie. I'm joined by James Barker, general  
19 counsel for Bungie.

20 MR. MANN: And I am Philip Mann. I'm here  
21 on behalf of all Defendants, in particular Phoenix  
22 Digital for this particular 30(b)(6) deposition.

23 VIDEOGRAPHER: Thank you all very much. Our  
24 reporter today is of Betsy Decater with Centex. Will  
25 the reporter please swear in the witness.

1 DAVID SCHAEFER,

2 sworn as a witness by the Certified Court Reporter,

3 testified as follows:

4

5 EXAMINATION

6 BY MR. MARCELO:

7 A. Now, is this the personal or the 30(b)(6)?

8 Q. This is the 30(b)(6) deposition of Phoenix  
9 Digital. My hope is that we will get everything done in  
10 this one deposition. But we can always shift over to  
11 the other deposition after if we need to.

12 Mr. Schaefer, you've been through this deposition  
13 process before, right?

14 A. Yes.

15 Q. You were deposed in connection with the  
16 arbitration?

17 A. Yes.

18 Q. Okay. So same general rules apply. I'm going to  
19 kind of go through them again. Remember to talk one at  
20 a time, wait for me to finish the question before you  
21 start answering. If something's unclear, ask me, I'll  
22 try to make the question more clear. No nonverbal  
23 answers. We'll need answers on the record. Okay?

24 A. Yes.

25 Q. And especially in video chats we tend to start

1       **Bungie accepting the terms of service other than what**  
2       **you just said?**

3           A.    What do you mean?

4           **Q.    Is there any record of Bungie accepting the terms**  
5       **of service?**

6           A.    Is there any record of David Schaefer accepting  
7       Bungie's terms of service?   Is there any record of Jeff  
8       Conway accepting Bungie's terms of service?   Is there  
9       any record of James May accepting Bungie's terms of  
10      service?   Is there any record of Phoenix Digital Group,  
11      LLC, accepting Bungie's terms of service?

12          **Q.    Mr. Schaefer, I'll just redirect you to my**  
13       **question.   Is there any record of Bungie --**

14          A.    I just answered it.

15          **Q.    Mr. Schaefer, are there any records of Bungie**  
16       **accepting Phoenix Digital's terms of service?**

17               MR. MANN:   Object to the form of the  
18       question.

19          A.    I'm still waiting for you to show me my accepting  
20       your terms of service or anybody else in our group.

21          **Q.    (BY MR. MARCELO) Mr. Schaefer, I'm going to need**  
22       **an answer.**

23          A.    Including Jeff Conway.

24          **Q.    Are there any records showing that Bungie agreed**  
25       **to Phoenix Digital's terms of service?**

1 MR. MANN: You mean other than the records  
2 that are in the possession of Bungie?

3 Q. (BY MR. MARCELO) Mr. Schaefer, what was your  
4 answer to the question of whether --

5 A. The answer to the question is no.

6 Q. And who -- how many times did Bungie accept  
7 Phoenix Digital's terms of service?

8 A. If they purchased once, then they agreed to it  
9 once. Every time you purchased, you had to agree.

10 Q. Does Phoenix Digital allege that Bungie agreed to  
11 the terms of service more than once?

12 A. No. We're not a -- I don't think they purchased  
13 more than once, if I -- if I remember correctly. And  
14 another thing too, if you take a look in them terms of  
15 service, it says that you can't go in there and purchase  
16 under an alias also. And if you look at PayPal's terms  
17 of service, it's against PayPal's rules to use a fake  
18 name like you guys did when you purchased it. So not  
19 only did you violate our terms of service, you violated  
20 PayPal's terms of service. Are you aware of that, Mr.  
21 Barker?

22 Q. So walk me through how Phoenix Digital alleges  
23 that Bungie accepted its terms of service.

24 A. Bungie accepted what?

25 Q. Walk me through how Phoenix Digital alleges that

1     Bungie accepted and agreed to Phoenix Digital's terms of  
2     service?

3                    MR. MANN: And I will remind the witness at  
4     this point we do not have to play around with any of the  
5     faking the names. If you remember the names of the  
6     person who did it, just say it. We're -- enough of  
7     this. We're not going to sit here and try and protect  
8     the guilty by using fake names.

9     Q. (BY MR. MARCELO) So, again, walk me through --

10    A. Bungie testified that they had their agent  
11    purchase the cheat.

12    Q. Who set up the process on the AimJunkies website  
13    of making accepting the terms of service a requirement?

14    A. I did.

15    Q. And so you were the one that, you know, wrote the  
16    website in a way that whenever you purchased the product  
17    you had to accept the terms of service?

18    A. Yes. It's called an API.

19    Q. What's called an API?

20    A. The application to do that.

21    Q. And that API, it only required that someone  
22    actually accept the terms of service before they  
23    purchased it, but it doesn't actually collect any  
24    information about that person that accepts it?

25    A. No.

1           **Q.** Phoenix Digital alleges that Bungie breached  
2 Phoenix Digital's terms of service, right?

3           A. Yes.

4           **Q.** Okay. Explain each way that Phoenix Digital  
5 alleges Bungie breached the Phoenix Digital terms of  
6 service.

7           A. Not only did they purchase the software and  
8 disassemble it, they purchased the software and used it.

9           **Q.** Okay. So they breached by disassembling the  
10 software?

11          A. Yes.

12          **Q.** And they breached it by using the software?

13          A. Yes.

14          **Q.** Any other ways?

15          A. Not that I can think of at the moment.

16          **Q.** And this was one of the topics in the deposition  
17 notice, right, was the ways that Phoenix Digital alleges  
18 that Bungie breached the terms of service?

19          A. Yes.

20          **Q.** Okay. How -- how exactly did Bungie disassemble  
21 the software?

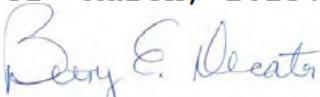
22          A. I don't know. I'm not Bungie.

23          **Q.** Okay. Let me back up actually. When you say  
24 disassemble and use the software, what software are you  
25 referring to?

## 1 REPORTER'S CERTIFICATE

2 I, BETSY E. DECATER, the undersigned Certified Court  
3 Reporter, pursuant to RCW 5.28.010 authorized to  
4 administer oaths and affirmations in and for the State  
5 of Washington, do hereby certify that the sworn  
6 testimony and/or proceedings, a transcript of which is  
7 attached, was given before me at the time and place  
8 stated therein; that any and/or all witness(es) were  
9 duly sworn to testify to the truth; that the sworn  
10 testimony and/or proceedings were by me stenographically  
11 recorded and transcribed under my supervision, to the  
12 best of my ability; that the foregoing transcript  
13 contains a full, true, and accurate record of all the  
14 sworn testimony and/or proceedings given and occurring  
15 at the time and place stated in the transcript; that a  
16 review of which was requested; that I am in no way  
17 related to any party to the matter, nor to any counsel,  
18 nor do I have any financial interest in the event of the  
19 cause.

20 WITNESS MY HAND and DIGITAL SIGNATURE this 27th day  
21 of March, 2023.

22 

23 BETSY E. DECATER, RPR  
24 Washington Certified Court Reporter, CCR 3109

25

# EXHIBIT F

1 ARBITRATION BEFORE JAMS

2 \_\_\_\_\_

3 BUNGIE, INC., )  
4 Claimant, ) CERTIFIED COPY  
5 vs. ) No. 5160000075  
6 AIMJUNKIES.COM; PHOENIX )  
7 DIGITAL GROUP LLC; DAVID )  
8 SCHAEFER; JORDAN GREEN; )  
9 JEFFREY CONWAY; and JAMES MAY,)  
10 Respondents. )

11 \_\_\_\_\_

12 VIDEO-RECORDED DEPOSITION UPON ORAL EXAMINATION OF  
13 DAVID SCHAEFER

14 \_\_\_\_\_

15 \*\*\* CONFIDENTIAL \*\*\*

16

17 9:15 A.M.

18 FRIDAY, OCTOBER 28, 2022

19 1201 THIRD AVENUE, SUITE 4900

20 SEATTLE, WASHINGTON

21

22

23 Reported by: Tami Lynn Vondran, CRR, RMR, CCR/CSR

24 WA CCR #2157; OR CSR #20-0477; CA CSR #14435

25 JOB NO.: 928464

1 A P P E A R A N C E S

2

3 FOR THE CLAIMANT:

4 CHRISTIAN W. MARCELO

5 WILLIAM C. RAVA

6 JACOB P. DINI

7 Perkins Coie

8 1201 Third Avenue, Suite 4900

9 Seattle, Washington 98101

10 206.359.8000

11 cmarcelo@perkinscoie.com

12 wrava@perkinscoie.com

13 jdini@perkinscoie.com

14

15 FOR THE RESPONDENTS:

16 PHILIP P. MANN

17 Mann Law Group

18 403 Madison Avenue North, Suite 240

19 Bainbridge Island, Washington 98110

20 206.436.0900

21 phil@mannlawgroup.com

22

23 ALSO PRESENT:

24 MATTHEW WOLCOTT, Videographer

25 JAMES BARKER, Bungie in-house counsel

Page 3

1	I N D E X	
2	EXAMINATION BY:	PAGE:LINE
3	Mr. Marcelo .....	8: 2
4	(Afternoon Session) Mr. Marcelo .....	144:11
5		
6		
7		
8		
9	EXHIBITS FOR IDENTIFICATION	MARKED
10	Exhibit 25 Limited Liability Company .....	31:22
11	Agreement of Phoenix Digital Group,	
12	LLC, a Delaware Limited Liability	
13	Company	
14	Exhibit 26 PayPal Account Info for David .....	67:16
15	Schaefer, PP_WDWA_0000014-21	
16	Exhibit 27 Excel Spreadsheet, .....	73: 9
17	PP_WDWA_0000146	
18	Exhibit 28 Printout from Virtual Advantage, ....	76:17
19	BUNGIE_JAMS_0001627-1628	
20	Exhibit 29 Printout from AimJunkies, .....	93:15
21	BUNGIE_JAMS_0001633-1634	
22	Exhibit 30 Defendant Phoenix Digital Group ....	138: 5
23	LLC's Responses to Plaintiff's	
24	First Set of Interrogatories	
25	Nos. 1-7	

		Page 4 MARKED
1	EXHIBITS FOR IDENTIFICATION	
2	Exhibit 31 Printout from AimJunkies, .....	183: 1
3		BUNGIE_JAMS_0001629-1632
4	Exhibit 32 Printout from AimJunkies, Cheat .....	188:16
5		Status
6	Exhibit 33 Printout from Mombot, Cheat .....	193:20
7		Status
8	Exhibit 34 Printout from AimJunkies, .....	200:19
9		BUNGIE_JAMS_0001635
10	Exhibit 35 Email from admin@aimjunkies.com, ...	209:16
11		dated 12/17/19
12	Exhibit 36 Spreadsheet, BUNGIE_JAMS_1613 .....	240: 1
13	Exhibit 37 Printout from AimJunkies, .....	249: 6
14		Destiny 2 Hack Features
15	Exhibit 38 Email from admin@aimjunkies.com, ...	252:11
16		dated 12/7/19
17	Exhibit 39 Email from admin@aimjunkies.com, ...	266:25
18		dated 1/3/20
19	Exhibit 40 Email from admin@aimjunkies.com, ...	267:15
20		dated 12/31/19
21	Exhibit 41 Printout from AimJunkies, .....	271: 9
22		Recruiting Cheat Developers
23	Exhibit 42 Letter and Envelope to Mark .....	278: 2
24		Humphrey, dated 11/20/20
25		

1 EXHIBITS FOR IDENTIFICATION

Page 5  
MARKED

2 Exhibit 43 Letter from Mark Humphrey, dated ... 293:24

3 11/4/20, BUNGIE\_WDWA\_0000542-543

4 Exhibit 44 Spreadsheet, PP\_WDWA\_0000146 ..... 294:17

5 Exhibit 45 Spreadsheet, PP\_WDWA\_0000152 ..... 298: 8

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 SEATTLE, WASHINGTON; FRIDAY, OCTOBER 28, 2022

2 9:15 A.M.

3 --000--

4

5 THE VIDEOGRAPHER: And we are on the record.

6 Here marks the beginning of File 1 in the deposition of

7 David Schrader --

8 THE WITNESS: Schaefer.

9 THE VIDEOGRAPHER: -- in the matter of Bungie  
10 incorporated versus AimJunkies.com, et al., in an  
11 arbitration before JAMS, Case Number 5160000075.

12 Today's date is October 28th, 2022. And the  
13 time is approximately 9:15 a.m.

14 This deposition is taking place at the offices  
15 of Perkins Coie, located at 1201 Third Avenue,  
16 Suite 4900, Seattle, Washington 98101, and was noticed  
17 by the claimant.

18 I'm the videographer today. My name is  
19 Matthew Wolcott of Central Court Reporting, 1700  
20 Seventh Avenue, Suite 2100, Seattle, Washington 98101.  
21 Phone number 206.682.5896.

22 The court reporter today is Tami Vondran, also  
23 of Central Court Reporting.

24 Would counsel please introduce yourself and  
25 state whom you represent.

1 MR. MARCELO: Christian Marcelo from Perkins  
2 Coie, representing Claimant Bungie, Inc. And I'm joined  
3 by William Rava and Jacob Dini from Perkins Coie, as  
4 well as James Barker from Bungie.

5 MR. MANN: And I am Philip Mann. I am here on  
6 behalf of the respondents.

7 And before we get started, would you mind if I  
8 take a look at the video monitor just to make sure --

9 THE VIDEOGRAPHER: Please do.

10 MR. MANN: Thank you.

11 Make sure we got his good side and all that  
12 stuff.

13 THE VIDEOGRAPHER: There we go.

14 MR. MANN: Looks fine. Thanks.

15 THE WITNESS: Oh, I was going to...

16 THE VIDEOGRAPHER: And will the court reporter  
17 now please swear in the witness.

18

19 DAVID SCHAEFER,

20 sworn as a witness by the Certified Court Reporter,

21 testified as follows:

22

23 THE COURT REPORTER: Thank you.

24 Please proceed.

25

1 AFTERNOON SESSION

2 1:05 P.M.

3 --000--

4

5 THE VIDEOGRAPHER: And we are back on the  
6 record.

7 Here marks the beginning of File 5 in the  
8 deposition of David Schaefer. The time is 1:05 p.m.

9

10 EXAMINATION RESUMED

11 BY MR. MARCELO:

12 Q. Mr. Schaefer, before we had gone to lunch, we  
13 had briefly discussed an individual named Lisa Holiday.

14 A. Uh-huh.

15 Q. And you had said that's your landlady?

16 A. Was.

17 Q. Was your landlady.

18 Did you have any other relationship with Lisa  
19 Holiday?

20 A. No.

21 Q. Not your girlfriend?

22 THE WITNESS: Is that fair?

23 MR. MANN: Confidential. I don't know what  
24 the relevance is, but it would be easier if you just --  
25 if you can answer, unless you have a concern.

1 A. What was the question?

2 Q. (BY MR. MARCELO) She wasn't your girlfriend?

3 A. No.

4 Q. Not your wife?

5 A. No.

6 See that?

7 Q. And to be clear, no other relationship with

8 Lisa Holiday other than her being your landlady?

9 A. Yes.

10 For the record, there's no ring on my finger.

11 Q. Did Lisa Holiday ever receive payments for you  
12 from PDG?

13 A. Yes.

14 Q. And so were you paid through Lisa Holiday?

15 I can rephrase it, if that's helpful.

16 A. Yeah.

17 Q. PDG paid Lisa Holiday; right?

18 A. Yes.

19 Q. What did they pay Lisa Holiday for?

20 A. Rent.

21 Q. Anything else?

22 A. Not that I'm aware of.

23 See, if you're the guy that controls the  
24 money, and you know that you've got -- if you take a  
25 look in those docs -- I know what you're referring to --

1 you'll look at all the payouts are the same. It's all  
2 partner pay. Well, I designate -- she gave me her  
3 PayPal. I owed her money. So instead of sending it to  
4 me, I just sent it directly to her.

5 But if you look, the partner payouts are all  
6 the same. So it's not like there's some random number  
7 going to Lisa Holiday.

8 Q. I see.

9 So PDG account with money from the cheat  
10 sales; right?

11 A. Yes.

12 Q. And you're owed a certain amount that would  
13 normally go into your PayPal account?

14 A. Yes.

15 Q. And instead you -- because you're the one  
16 directing where the finances go -- have that payment go  
17 to -- directly to Lisa Holiday?

18 A. That's correct. Lived at the same address  
19 because I rented a room.

20 Q. Oh, you were renting a room in her apartment?

21 A. House.

22 Q. House?

23 A. Yes.

24 Q. From the payments sent from PDG to Lisa  
25 Holiday, did she ever send payment back to you?

1           A. I don't know.

2           **Q. Did Lisa Holiday regularly pay you?**

3           A. I did -- I did some work for her, you know,  
4 for her -- for her -- you know, because she has a  
5 regular job. And I did some work for her and sometimes,  
6 yes, she did pay me.

7           **Q. Was it a regular payment, like monthly  
8 payments?**

9           A. No. I think they were mixed -- there might  
10 have been -- there was nothing set. She -- you know,  
11 her clients, I would do side work for. That's why when  
12 you were talking about PayPal payments, are all my  
13 PayPal payments me, you know, or just from PDG, and I  
14 said "I don't know," and now you just reminded me of  
15 that. I forgot about that.

16           **Q. What was the type of work you were doing for  
17 Lisa?**

18           A. Search engine optimization and website  
19 building and things like that.

20           **Q. And is her company Lisa Repairs?**

21           A. Yes.

22           **Q. What does her company do?**

23           A. I can't talk about that. We're going to go  
24 through the same deal that we went through yesterday.  
25 She has clientele that do not want to be -- that she has

1

## REPORTER'S CERTIFICATE

2

I, TAMI LYNN VONDTRAN, the undersigned Certified Court Reporter/Shorthand Reporter for the State of Washington, the State of Oregon and the State of California, do hereby certify that the sworn testimony and/or proceedings, a transcript of which is attached, was given before me at the time and place stated therein; that any and/or all witness(es) were duly sworn to testify to the truth; that the sworn testimony and/or proceedings were by me stenographically recorded and transcribed under my supervision, to the best of my ability; that the foregoing transcript contains a full, true, and accurate record of all the sworn testimony and/or proceedings given and occurring at the time and place stated in the transcript; that a review of which was requested; that I am in no way related to any party to the matter, nor to any counsel, nor do I have any financial interest in the event of the cause.

WITNESS MY HAND AND DIGITAL SIGNATURE this 9th day of November, 2022.



TAMI LYNN VONDTRAN, CRR, RMR, CCR/CSR  
Washington CCR #2157, Expires 10/6/2023  
Oregon CSR #20-0477, Expires 9/30/2024  
California CSR #14435, Expires 10/31/2023

25

# **EXHIBIT G**

**CITATION:** Bungie Inc. v. TextNow Inc., 2022 ONSC 4181  
**COURT FILE NO.:** CV-22-682808  
**DATE:** 20220715

**ONTARIO SUPERIOR COURT OF JUSTICE**

**RE:** BUNGIE INC., JAMES DOE, AND JANE DOE Applicants

-and-

TEXTNOW INC., Respondent

**BEFORE:** FL Myers J

**COUNSEL:** Neil Paris, Adam Stikuts, and Zach Parrott, for the Applicants

**READ:** June 15, 2022

**ENDORSEMENT**

**The Motion**

- [1] I granted *ex parte* relief in this urgent motion in writing on June 15, 2022. In view of the serious nature of the allegations of danger to the individual applicants, I have withheld reasons until counsel for the applicants advised recently that the need for confidentiality had abated.
- [2] This is an application for an urgent and confidential *Norwich Pharmacal* order requiring the respondent to disclose the identity of customers who are using the respondent's anonymized telephone numbers to make racist and serious physical threats against the individual applicants.
- [3] The applicants have submitted evidence that customers of the respondent are "doxxing" the individual applicants. Doxxing refers to a malicious use of the internet to search for and expose on social media and elsewhere private information about individuals so as to threaten to harm them or to enable others to do so.
- [4] The application raised a number of procedural issues to which the applicants responded.

## The Facts

- [5] Bungie Inc. operates the popular multiplayer online game known as *Destiny 2*. More than 40 million users play or stream it (i.e. watch others play the game online).
- [6] The applicants James Doe and Jane Doe are employees of Bungie Inc. One is a developer. The other is a “Community Manager” who receives player feedback and communicates with players.
- [7] The two employees live together with their child in the United States. The precise location is not important. What is clear however is that the underlying criminal and tortious activity against the two employees is aimed at them in the US and not in Ontario.
- [8] The respondent TextNow Inc. is a CBCA company with its registered office in Waterloo, Ontario. It is a mobile virtual network operator.
- [9] TextNow buys access to phone networks operated by telephone companies. It then provides its customers with access to telephone numbers in its name throughout North America for very little cost.
- [10] TextNow’s terms of service make clear its intention to protect the anonymity of its customers.
- [11] While protecting customers’ private information is usually a good and necessary function of any business, it comes as no surprise that a business that provides cheap, anonymous telephone numbers for customers might find its services used for nefarious purposes. One might pause to wonder whether this is the intent of TextNow’s business model. But it makes no difference to the outcome and I have no evidence to make any findings on the point in any event.
- [12] On June 2, 2022, one of the applicant employees tweeted an advertisement for *Destiny 2* on his or her personal account on Twitter. The ad consisted of two videos of a *Destiny* player who goes by the online name or handle “Uhmaayyze”.
- [13] Uhmaayyze is African-American. He is well known among those who play and watch *Destiny 2* because he performs freestyle rap on live-streaming platforms while he plays the game.

- [14] The video ads tweeted by an applicant name Uhmaayze as a “Hero”. They are part of a series of ads celebrating unique contributions of members of the “Destiny Community”.
- [15] The Twitter account used by the applicant identified her as a representative of Bungie Inc.
- [16] Later that day, an anonymous person posted messages on Twitter directed at Bungie accounts threatening to kill Bungie employees on June 14, 2022. Shortly after, several employees of Bungie began receiving voicemails and text messages on personal, unpublished telephone numbers repeatedly using the racial slur referred to colloquially as the “N-word”.
- [17] That night a person who called himself “Brian” left a voicemail on the personal telephone line of the employee who posted the ads. Brian referred to the employee by name and requested that *Destiny 2* provide a scene or a downloadable piece of the game (a “DLC”) for “N-word killing”. A few minutes later he called back and identified himself as a member of a far-right-wing social network known to publish material that is censored from mainstream social media. He repeated the request for an “N-word killing” DLC to be added to *Destiny 2*.
- [18] About an hour later, the other employee spouse received an anonymous text message saying:

Hey actually scratch that. You're a fat bitch and [OTHER EMPLOYEE'S NAME] is a limp wristed homo. Tell him to pass this up to the team. ADD A N\*\*\*\*R KILLING DLC.

- [19] Several voicemail messages were then left for the second employee including a recorded voice saying the N-word electronically chopped and edited to rapidly repeat the word in different pitches over 20 times.
- [20] In another voicemail, the caller said “Enjoy your pizza.”
- [21] Around the same time, a person using the same telephone number as the anonymous caller ordered a pizza to the employees’ home address.
- [22] Not surprisingly, the use of the employees’ home address frightened them. They called the local police and made a report.

- [23] The applicants' evidence also reports that recently, a *Destiny 2* user with the username “@Inkcel” had been making threats against one of the employee applicants. Inkcel tweeted a picture of the employee's Bungie staff ID card. He tweeted that he had moved to live 30 minutes from the employee.
- [24] Inkcel tweeted that the employee “is not safe”. Inkcel tweeted the employees full legal name.
- [25] The similarity of the name “Inkcel” to the term “incel” makes the threats more frightening to the applicants as well. The term “incel” stands for “involuntary celibate” and refers to a violent misogynist ideology espoused by some who identify themselves with that term.
- [26] The employees also fear that the use of their home address may be a prelude to a dangerous attack referred to as “swatting”. This is a “prank” where someone reports to the police that a serious crime is under way at the victim’s house. The goal is to induce the police to dispatch a SWAT team to the victim’s home. If the victim is livestreaming at the time, the people watching on the internet presumably find it entertaining to watch the police invade the home of the unsuspecting victim.
- [27] Not only is it terrifying to have a SWAT team descend upon one’s house, but it is dangerous. People have been killed in such “pranks”.
- [28] Sending a pizza to a doxxing victim’s home is a threat by the doxer that he knows where the victim and his or her family live.

### **The Respondent**

- [29] The telephone number through which the anonymous person has been harassing the applicant employees is operated by the respondent TextNow.
- [30] I quote from the applicants’ factum to describe information held by TextNow about its customers:

38. According to [TextNow’s] Privacy Policy, TextNow collects and retains information about its users, including: name; user ID; email address; phone number; Internet protocol (“IP”) address; device ID; advertiser ID; device type, settings, and operating system; logs of calls and messages sent and received; credit card

number; records of purchases of TextNow services, information about the user's interactions with the TextNow application and advertisements; and latitude/longitude coordinates and general physical location or movements of the user from IP and Wi-Fi access information.

39. To create a new TextNow user account, the user must connect their TextNow account to a pre-existing Google, Facebook, or Apple account. TextNow likely has additional information connected to the Facebook, Apple, or Google account that John Doe used to register for TextNow's services. **TextNow states it will only preserve its records for 90 days and absent a non-disclosure order, TextNow will inform users of any requests for their customer information and give them seven days to dispute the request in court.**

### **Form of the Order**

40. To its credit, TextNow publishes a help page on its website describing the directions and details that it requires to process a court order for the production of user data. TextNow's policy specifies that the order must: be Addressed to "TextNow, Inc."; contain a valid TextNow number or username; contain a specific list of user data; contain a specific date or date range of the requested records due to number recycling; contain a specific time zone the requested records are in; be signed and dated; and include a requested due date of the Order. TextNow also provides an email address for receiving subpoenas and court processes. [Emphasis added. Footnotes omitted.]

### **Procedural Issues**

- [31] On June 13, 2022, counsel submitted a request for an urgent hearing by email under s. C.1.8 of the *Notice to Profession – Toronto; Toronto Expansion Protocol for Court Hearings During COVID-19 Pandemic*. Counsel provided an unissued draft notice of application. It named only TextNow as the applicant. The draft application was accompanied by an affidavit of in-house counsel. The evidence in the affidavit was entirely based on unattributed hearsay and a fair degree of speculation.

- [32] In granting an urgent hearing in writing the next morning, I had the Trial Coordinator send the following endorsement to the counsel:

This matter is urgent. It is brought without notice. Applications without notice are heard in writing under s. C.1.3 of the *Notice to the Profession* in the Toronto Region.

I have several concerns about this application. The applicant is the employer of two people who are allegedly being harassed. Its standing to act for the victims is not at all clear. Moreover, the affiant has little personal knowledge of the matters to which he attests. The filing of articles about swatting and professing a fear of increasing degrees of risk of harm to the employees is purely speculative. This may be more a criminal matter for law enforcement where the employees reside.

This is a *Norwich Pharmacal* [sic] proceeding to learn the name of the alleged harasser. Usually these orders are made on notice to the respondent and orders go on consent or are unopposed. The only rationale for proceeding *ex parte* here is the concern that the respondent has a policy to tell its customers of applications of this type. The court should hear submissions about the availability of an interim order prohibiting disclosure of the application by the respondent to its customer pending the outcome of the application on notice.

I will consider the question of whether to make an interim order prohibiting disclosure of this application by the respondent when served. The applicant may deliver further evidence if so advised. It shall deliver a factum to establish (a) its standing to bring the *Norwich Pharmacal* application; (b) the admissibility of the General Counsel's evidence; and (c) the test for making an order without notice prohibiting a respondent from disclosing a *Norwich Pharmacal* [sic] application to the target of the investigation. The applicant shall also deliver a draft order. Material can be delivered to my Judicial Assistant at Therese.navrotski@ontario.ca.

- [33] Late that afternoon, counsel submitted revised material that resolved all of the issues that I had raised. Their factum was especially helpful and I express my gratitude to counsel for reacting so quickly and thoroughly.

## Anonymized proceedings

- [34] The applicants solved my concern about its standing by naming the employees as parties. It also delivered brief affidavits from the employees attesting to the information in the lead affidavit. The affidavits did not identify the employees by name. But they were signed and pursuant to my endorsement discussed below, I required that the application be commenced using the employees' legal names.
- [35] Where a party to a proceeding wishes anonymity, they need an order. Typically, the order is obtained in Civil Practice Court or in writing just before the commencement of the proceeding. The order should require the proceeding to be commenced in the parties' legal names. If there are grounds to do so, the initial material will be sealed immediately and the order will approve the use of pseudonyms to refer to those parties thereafter. In that way, there is a proper record of a proceeding brought by an identified person *sui juris* or with capacity to sue. Moreover, by using pseudonyms, an order sealing the full court file can usually be avoided protecting the open courts principle.

## Notice to the Respondent

- [36] Some case law questions whether notice of applications for *Norwich Pharmacal* orders ought to be given to the alleged wrongdoer who is the target of the order. See, for example, *York University v. Bell Canada Enterprises*, 2009 CanLII 46447 (ON SC). The arguments against doing so usually centre on whether providing notice to the alleged wrongdoer might precipitate dissipation of assets or further wrongdoing. In this case, for example, it would border on the foolhardy to give notice to the alleged wrongdoer given the types of threats that he has made against the employees.
- [37] But here, the applicants go further and move without notice to the respondent service provider/recordkeeper. As I said in my first endorsement, usually these orders are made on notice and without opposition by credible recordkeepers like the banks, internet service providers (like Rogers, Bell, and Telus) or major website operators (like Google and Facebook for example).

- [38] The applicants submit that given the express promise by TextNow to inform its customers if their names are sought as set out in its terms of service, it is necessary to obtain an order preventing TextNow from doing so before it has a chance to follow through. One does not need a very broad imagination to think that there may be service providers who share the interests of those to whom they knowingly offer anonymizing services. Providing notice of an application for a *Norwich Pharmacal* order to such a company would be an invitation for it to hurry to notify its customer before an order is made to prevent it from doing so.
- [39] Rule 38.06 allows a party to move for directions as to whether notice of an application is required. No specific factors are provided for the judge to consider on such a motion. However, by way of analogy, Rules 37.07 (2) and (3) allow for motions to be made without notice as follows:
- (2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.
- (3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.
- [40] In my view, in light of the express terms of service of TextNow, this is a case in which notice of the application should be waived in the interests of justice. The delay necessary to give notice of this proceeding “might entail serious consequences”. If TextNow tells its customer, as it has committed to do, the harm he might commit given his anti-social behaviour and overt threats is very serious.
- [41] Accordingly, I made the following endorsement in granting the order sought on June 15, 2022:

For reasons to be delivered, order to go as sought. The applicants shall commence the application in their legal names. The issued Notice of Application and any original amended notices and original affidavits shall be sealed and shall not form part of the public record pending further order of the court.

These proceedings are hereby anonymized. All references to the individual applicants shall use the pseudonyms James Doe and Jane Doe respectively. As soon as the application is commenced in

the parties' legal names, the title of proceeding is amended to substitute the pseudonyms for the legal names. All parties shall file only anonymized versions of their materials in the public court file.

The test for a *Norwich Pharmacal* order is readily met. The respondent's business model and public policies make it too dangerous to risk providing notice to it before non-disclosure and anonymization orders are in place. There will be no prejudice to the respondent by the issuance of this order. If the respondent moves to set aside this order, the burden will be on the applicants to justify the order afresh.

I am satisfied that a non-disclosure order is required to prevent the purpose of this order from being undermined.

The applicants shall give notice of the making of the sealing and confidentiality order to the press in accordance with the court's Practice Direction. A case conference may be convened before me if any member of the press advises the applicants' counsel that it wishes to question the order.

### **The Norwich Pharmacal Order**

[42] In the *York University* decision mentioned above, Strathy J. (as he then was) set out the legal test for a *Norwich Pharmacal* order:

[13] On August 21, 2009, the Court of Appeal for Ontario released its decision in GEA Group AG v. Ventra Group Co., [2009] O.J. No. 3457, 2009 ONCA 619 ("GEA Group"), which conducted an extensive review of the Canadian cases in which Norwich orders have been granted and discussed "the circumstances in which this extraordinary discretionary relief may be obtained in Ontario" (at para. 1). The Court of Appeal agreed with earlier authorities that the following factors govern the determination of whether to grant a Norwich order [at para. 51]:

- (i) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;
- (ii) Whether the applicant has established a relationship with the third party from whom the information is sought,

such that it establishes that the third party is somehow involved in the acts complained of;

(iii) Whether the third party is the only practicable source of the information available;

(iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure; and

(v) Whether the interests of justice favour obtaining the disclosure. [List of cases omitted.]

- [43] The purpose of the order is to let the plaintiffs or applicants obtain the name of the person whom they wish to sue. No money damages are sought. The plaintiffs just seeks discovery of information – usually a name and address.
- [44] There also usually is no allegation that the respondent in the *Norwich Pharmacal* proceeding has done anything wrong itself. But, the target defendant, whom the plaintiff alleges is a wrongdoer, must have implicated the respondent somehow in his or her wrongful acts.
- [45] Here he used the respondent's anonymous telephone line to conduct his racist harassment and to make his threats. In most fraud cases, the fraudster deposits money in one or more bank accounts and uses the bank's services to move the money away from the plaintiff. The acts of the wrongdoer engage the recordkeeper respondent sufficiently in the wrongdoing that equity requires the recordkeeper to assist as the applicant/plaintiff seeks access to justice.
- [46] In *GEA Group AG v. Flex-N-Gate Corporation*, 2009 ONCA 619 (CanLII), the Court of Appeal stressed the importance for the court to assess the need for discovery and the proposed use to which the information sought may be put:

[85]...It is therefore incumbent on the applicant for a Norwich order to demonstrate that the discovery sought is required to permit a prospective action to proceed, although the firm commitment to commence proceedings is not itself a condition precedent to this form of equitable relief.'

...

[91]... While an applicant for Norwich relief must establish that the discovery sought is needed for a legitimate objective, this requirement may be satisfied in various ways. The information sought may be needed to obtain the identity of a wrongdoer (as in *Norwich Pharmacal*), to evaluate whether a cause of action exists (as in *P. v. T.*), to plead a known cause of action, to trace assets (as in *Bankers Trust and Leahy*), or to preserve evidence or property (as in *Leahy*). The crucial point is that the necessity for a Norwich order must be established on the facts of the given case to justify the invocation of what is intended to be an exceptional, though flexible, equitable remedy.

- [47] In this case, the applicants have no intention to sue the target(s) in Ontario. Whether they sue in the US or just give the name to the police, I am satisfied that the exceptional equitable remedy ought to be available to identify people who harass others, with base racism, who dox, abuse personal information, and make overt threats of physical harm and death. Obtaining discovery of the identity of a purported criminal and civil wrongdoer is a recognized purpose of a *Norwich Pharmacal* order. It makes no difference that the wrongdoer target is not in Ontario or that proceedings will not be brought here. We exercise comity with the US courts and justice system and we know we can rely upon them to provide full faith and credit to our requests for assistance. While this request could have come through other routes (criminal or judicial), there is nothing objectionable about the use of a *Norwich Order* providing its prerequisites are met as they are here.

---

FL Myers J

**Date:** July 15, 2022